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DEBORAH TAMBURRI,

Plaintiff,

v.

SUNTRUST MORTGAGE, INC.; WELLS

FARGO BANK, N.A.; U.S. BANK

NATIONAL ASSOCIATION; MORTGAGE

ELECTRONIC REGISTRATION SYSTEMS,

INC., RECONTRUST COMPANY, N.A.; and

DOES 1-20;

Defendants.

) Case No: 3:11-CV-02899-EMC

) Hon. Judge Edward M. Chen

) **PLAINTIFF’S NOTICE OF OPPOSITION**
) **AND OPPOSITION TO DEFENDANTS’**
) **SUNTRUST MORTGAGE, INC.,**
) **MORTGAGE ELECTRONIC**
) **REGISTRATIONS SYSTEM, INC’S ,**
) **WELLS FARO BANK N.A.’S, and U.S.**
) **BANK NATIONAL ASSOCIATIONS’S**
) **MOTION TO DISMISS PLAINTIFF’S**
) **SECOND AMENDED VERIFIED**
) **COMPLAINT AND MOTION TO**
) **STRIKE; MEMORANDUM OF POINTS**
) **AND AUTHORITIES IN SUPPORT;**
) **[PROPOSED ORDER]**

) Hearing Date: May 18, 2012

) Time: 1:30 p.m.

) Location: 450 Golden Gate Avenue, San
) Francisco, CA

) Courtroom: 5 – 17th Floor

) First Amended Complaint Filed: June 10, 2011
) Trial Date: Not Set

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 18, 2012 at 1:30 p.m. or as soon thereafter as may be heard, in Courtroom 5 on the 17th floor of the above-entitled Court located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff Deborah Tamburri (“Plaintiff”) will oppose the Motion to Dismiss the Plaintiff’s First Amended Verified Complaint made by defendants Suntrust Mortgage, Inc. (“Suntrust”), Mortgage Electronic Registration Systems, Inc.

1 (“MERS”), U.S. Bank National Association (“US Bank”), and Wells Fargo Bank, N.A. (“Wells
2 Fargo”).

3 The opposition will be based upon this Notice and accompanying Memorandum of Points
4 and Authorities, all papers on file with this Court, and any oral argument that may be presented
5 at the hearing on this motion.
6

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 Defendants, Suntrust Mortgage, Inc., Mortgage Electronic Registration Systems, Inc.,
10 U.S. Bank, N.A., and Wells Fargo’s motion to dismiss does not even address significant portions
11 of plaintiff’s factual allegations in her second amended complaint, but rather appears to be based
12 nearly in whole on their claim that the plaintiff was not prejudiced by their repeated
13 misrepresentations regarding the ownership of plaintiff’s loan and that plaintiff has not plead,
14 and cannot prove, damages. While this Court already denied the defendants’ motion to dismiss
15 on the causes of action for “wrongful foreclosure” and “violation of California Civil Code
16 section 2923.5” and rejected defendants’ arguments that plaintiff could not demonstrate
17 prejudice and ruled that “California law requires strict compliance with non-judicial foreclosure
18 statutes”, the plaintiff has indeed plead prejudice.
19

20 As the plaintiff alleges in her complaint, as a result of being constantly misled over the
21 owner of her loan (and therefore not being able to speak to said entity about avoiding
22 foreclosure) she has endured “substantial emotional anguish” and “deep-seated emotional harm”,
23 which has “caused her to become depressed, suicidal and physically ill.”, Indeed, it is a well-
24 settled principle of California tort law, which includes the “wrongful foreclosure” cause of action
25 and other causes of action pertaining to the “illegal, fraudulent or willfully oppressive sale of
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1 property under a power of sale contained in a deed of trust” that “the measure of damages for a
2 wrong other than breach of contract will be an amount sufficient to compensate the plaintiff for
3 all detriment, foreseeable or otherwise, proximately occasioned by the defendant’s wrong.”
4 *Munger v. Moore*, 170 Cal.App.3d 1,7, 11 (citing Cal. Civ. Code § 3333). Furthermore,
5 emotional distress damages have long been considered damages encompassed within the
6 purview of California Civil Code section 3333, which is the fundamental statutory provision
7 governing tort damages in California. *Pintor v. Ong*, 211 Cal.App.3d 837, 842 (1989) (citing
8 California Civil Code section 3333 as part of a holding that “the general rule of tort damages” is
9 “that all detriment proximately caused by breach of a legal duty is compensable, including
10 damages for emotional distress.”); *Young v. Bank of America* (1983) 141 Cal.App.3d 108, 113.
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12
13 Moreover, as the plaintiff alleges in her complaint, she was unable to discuss *any* options
14 regarding avoiding foreclosure with SunTrust, and was repeatedly told by SunTrust that they had
15 no authority to offer any sort of assistance whatsoever. Thus, the plaintiff was indeed prejudiced
16 by not being able to speak to the entity who actually had the legal authority to provide her with a
17 loan modification or other argument to avoid foreclosure, which SunTrust steadfastly refused to
18 do.
19

20 Finally, the defendants continue to speciously argue that the plaintiff is acting in bad faith
21 in an attempt to simply delay the inevitable foreclosure in order to live in the property for free,
22 which is simply factually false because (as the defendants are fully aware) the plaintiff has been
23 making \$2,000 monthly payments to this Court as a condition of the preliminary injunction
24 remaining in place. Despite the fact that the plaintiff has substantial evidentiary support for her
25 claims (which were put before the Court in her motion for a preliminary injunction, which was
26 granted), all that is issue in the instant motion is whether or not the plaintiff has properly pleaded
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1 facts sufficient to state a claim for each of her eight causes of action. *Bell Atlantic v. Twombly*,
2 550 U.S. 544, (2007). The plaintiff has easily met this standard for all of her causes of action.

3 **II. FACTUAL BACKGROUND**

4 Plaintiff Deborah Tamburri purchased the subject property in 1983 along with her
5 former husband. Citation. She has never previously been in foreclosure proceedings before the
6 events described in this lawsuit. The Plaintiff signed a Note and Deed of Trust on December 12,
7 2006 in favor of Suntrust Mortgage, Inc. In the Deed of Trust, MERS is identified as the
8 beneficiary, the plaintiff is the trustor, and Jackie Miller is the beneficiary.

9
10 Shortly after the transaction was consummated, the plaintiff's loan was securitized and
11 placed into a trust. Pursuant to the terms of the trust, SunTrust was the servicer and Wells Fargo
12 was the master servicer. The terms of the pooling and servicing agreement of the trust provide
13 for substantial compensation for SunTrust and Wells Fargo when borrowers default on their
14 loans. This compensation scheme disincentives SunTrust and Wells Fargo to provide a loan
15 modification or other alternative to avoid foreclosure to borrowers, but rather encourages them to
16 extend the process as long as possible as they earn additional compensation through such a delay.

17
18 Due to the global recession that began in 2008, the plaintiff lost her job and,
19 consequently, fell into default on this loan in the summer of 2008. The plaintiff contacted
20 Suntrust on September 13, 2008 and spoke with Christina Reyes in collections, and the plaintiff
21 requested a forbearance plan. Ms. Reyes simply instructed her to fax in a letter with some
22 information. The plaintiff did send in the fax, but was told on several occasions by Suntrust that
23 they did not receive. However, SunTurst never, in person or by telephone, spoke with the
24 plaintiff about her options to avoid foreclosure.

25
26 On April 21, 2009, Suntrust recorded a Notice of Default with the Contra Costa County
27 Recorder's Office. In the Notice of Default, an entity named Trustee Corps asserted that the
28 "present beneficiary" under the Deed of Trust had delivered to it the Deed of Trust "evidencing

1 the obligations secured thereby” and declared the plaintiff in default. A Substitution of Trustee
2 was recorded on October 22, 2009 that appeared backdated, as the date on the document is July
3 22, 2009. Moreover, Trustee Corps subsequently recorded a Notice of Trustee’s Sale in
4 October 2009, in which they scheduled a sale date of November 17, 2009 and declared that
5 Suntrust was the beneficiary in the Deed of Trust. However, no Substitution of Trustee had been
6 recorded as of this date. Furthermore, no assignment had been recorded assigning the Deed of
7 Trust from MERS to Suntrust as the beneficiary, and the plaintiff submits that no assignment was
8 ever executed because the plaintiff had been repeatedly told by Suntrust prior to this date that
9 Wells Fargo owned her loan. Very suspiciously, this Notice of Trustee’s Sale was removed from
10 the Contra Costa County Recorder’s Office and is no longer part of the public record.
11

12 After receiving the Notice of Default, the plaintiff immediately contacted Suntrust to see
13 if she could obtain a loan modification. The plaintiff was repeatedly asked to send the same
14 documents and the same information to Suntrust, presumably because Suntrust had lost,
15 misplaced or threw away the previous information she had sent. *Id.* Frustrated with Suntrust’s
16 sloppiness, the plaintiff sent a qualified written request to Suntrust in November 2009 asking
17 them to verify the amount that she owed. In response, the plaintiff received a letter detailing
18 information for another individual’s loan, not hers.
19

20 The foreclosure sale was originally scheduled for November 17, 2009, but was
21 postponed. Shortly after the postponement, the plaintiff’s son came home from school and saw a
22 notice of the sale posted to the door. The plaintiff was horrified and humiliated that her son had
23 seen a document indicating that the family home would be sold. The previously-recorded Notice
24 of Default was rescinded on January 13, 2010. However, the plaintiff was informed by Suntrust
25 on February 16, 2010 that her home was scheduled to be sold the next day. Thus, the plaintiff
26 went to the Contra Costa County Recorder’s Office and stood there all day to ensure that her
27 home would not be sold.
28

1 Feeling frustrated by her inability to get any meaningful information on her loan or
2 alternatives to foreclosure from Suntrust, and having been told on numerous occasions that Wells
3 Fargo owned her loan, the plaintiff sent a qualified written request to Wells Fargo in February
4 2010. Wells Fargo responded by sending the plaintiff a letter in which is stated that it was
5 “unable to confirm” the plaintiff’s name “as an active borrower.” *Id.* Moreover, Wells Fargo
6 stated that it was “unable to verify active mortgage on the property address or loan number”
7 applicable to the plaintiff. *Id.* Furthermore, the plaintiff contacted Wells Fargo telephonically
8 around this time to see if anything could be done to save her home, but was told by a Wells
9 Fargo representative that Wells Fargo had no ownership interest in plaintiff’s loan, despite
10 Suntrust’s repeated assertions that Wells Fargo owned her loan. Thus, the plaintiff received
11 conflicting information regarding the vital piece of information as to which entity actually held
12 the subject promissory note, which was secured by her home.
13

14 Between January and June 2010, the plaintiff repeatedly contacted Suntrust in an attempt
15 to discuss her options to avoid foreclosure. However, the Suntrust representatives that the
16 plaintiff spoke with were unresponsive, and she was never informed of her options to prevent the
17 loss of her home. *Id.* Indeed, Suntrust representatives told the plaintiff that they had no control
18 over whether or not to grant the plaintiff a loan modification, but Nonetheless, Suntrust recorded
19 another Notice of Default on June 9, 2010, in which a purported Suntrust representative
20 (identified by defendant’s counsel in the defendants’ opposition to the plaintiff’s request for
21 preliminary injunctive relief as Margaret Shaw, although her signature is illegible and the
22 Declaration does not contain her printed name) falsely claimed in a form Declaration of
23 Compliance that the “Servicer” had contacted the plaintiff to explore her options to avoid
24 foreclosure. However, despite the plaintiff’s repeated attempts to discuss her options to avoid
25 foreclosure telephonically, Suntrust representatives were non-responsive and simply asked her to
26 send in the same documents again and again.
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2 On June 21, 2010, Recontrust, N.A. recorded an Assignment of the Deed of Trust and
3 Substitution of Trustee at issue in this action in the Contra Costa County Recorder's Office
4 naming Mortgage Electronic Registration Systems, Inc. as grantor and the plaintiff and U.S.
5 Bank as grantee. Recontrust Company, N.A. was also substituted in as trustee under the subject
6 Deed of Trust, vis-à-vis this document. The document stated that "[t]o find out the amount you
7 must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure
8 for any other reason, contact U.S. BANK NATIONAL ASSOCIATION . . ."

10 This document was backdated. While the date on the document is June 8, 2010, it was
11 not recorded until June 21, 2010 and the notary public signature date is June 10, 2010, the day
12 after the Notice of Default was recorded. Thus, as this Court previously noted in its last order
13 denying the defendants' motion to dismiss on the plaintiff's "wrongful foreclosure" cause of
14 action, neither US Bank nor Recontrust had the authority to record this document on the day of
15 recordation. Thus, the Notice of Default is invalid. Furthermore, this document is signed by "T.
16 Sevillano" who has signed documents on behalf of MERS, Bank of America, N.A. and
17 Recontrust recently. Thus, the plaintiff questions the authority of "T. Sevillano" to sign
18 documents on behalf of MERS.
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21 After receiving the Notice of Default in the mail, the plaintiff looked up her mortgage on
22 the electronic registry for MERS. The plaintiff typed in her name and mortgage identification
23 number into the MERS registry, and the MERS registry indicated that the plaintiff's loan was
24 owned by UBS Real Estate Securities, Inc. The plaintiff was driven to contact the owner of her
25 loan, as Suntrust had repeatedly told her that they had no independent authority to affect any
26 decision regarding her mortgage. When the plaintiff contacted UBS, she was referred to an
27 individual named John Rand. Mr. Rand informed the plaintiff that UBS had not owned any
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1 mortgages in a year, and that all of their previously-owned mortgages were bundled, securitized
2 and sold. Mr. Rand referred the plaintiff to Mr. David Stack at PHH Mortgage, the Vice
3 President of the mortgage division for UBS. However, Mr. Stack was also not able to provide
4 assistance to the plaintiff, as he could not find any record of PHH Mortgage or UBS having ever
5 owned her mortgage. As a result, the plaintiff felt utterly helpless, as she had been desperately
6 trying to speak to someone with authority to provide her with an option to avoid foreclosure such
7 as a loan modification.
8

9 On December 15, 2010, a Notice of Trustee's Sale was recorded with the Contra Costa
10 County Recorder's Office with a scheduled sale date of January 7, 2011. The plaintiff filed a
11 voluntary chapter 7 bankruptcy petition in order to stop this unlawful foreclosure sale, and to
12 discharge her unsecured debts. On March 10, 2011, the plaintiff submitted a third qualified
13 written request on Suntrust, Mortgage Electronic Registration Systems and US Bank. Only
14 Suntrust responded, and they asserted that Wells Fargo owned the plaintiff's loan in their
15 response. The plaintiff received her bankruptcy discharge on April 6, 2011. She filed the instant
16 action on April 13, 2011 shortly after receiving her discharge.
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19 On the morning of April 14, 2011, Suntrust pushed back the foreclosure sale until June
20 15, 2011 at 10 a.m. Therefore, the plaintiff did not proceed with the hearing scheduled for that
21 date, because the relief sought therein was moot (there was no longer a foreclosure sale to enjoin
22 and no irreparable harm). With one last hope that the current dispute could be resolved out of
23 court, the plaintiff submitted documentation for a loan modification to the defendants. Just as
24 they had done before, Suntrust simply informed the plaintiff to submit documentation for a loan
25 modification, and never verbally discussed plaintiff's options to avoid foreclosure, as required by
26 California Civil Code 2923.5. The plaintiff's counsel was informed that the plaintiff was denied
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1 for a loan modification on June 8, 2011. The plaintiff decided to amend her complaint to add
2 Mortgage Electronic Registration Systems as a defendant, and to make the argument that
3 California Civil Code Section 2932.5 requires that a lender have recorded a valid assignment of a
4 Deed of Trust before foreclosing. A First Amended Complaint was filed on June 10, 2011, and
5 served that same day on all of the defendants in this action.
6

7 On June 13, 2011, the plaintiff's counsel gave notice to all of the defendants to this action
8 that the plaintiff would be moving ex parte for a temporary restraining order on June 14, 2011, in
9 order to enjoin the foreclosure sale scheduled for 10:00 a.m. on June 15, 2011. On June 14,
10 2011, Suntrust removed this action to federal court. Later that day, the plaintiff moved in this
11 Court for a temporary restraining order, which was granted, and an order to show cause hearing
12 why a preliminary injunction should not issue was scheduled for June 28, 2011. Suntrust and
13 MERS filed oppositions to the order to show cause, and this Court granted the plaintiff's motion
14 for a preliminary injunction at the hearing (with a formal order issued on July 6, 2011).
15

16 At the hearing on the motion for the preliminary injunction, in a response to an inquiry
17 from the Court, Suntrust's counsel stated that Wells Fargo owned the plaintiff's loan and was the
18 current beneficiary under the Deed of Trust. Notwithstanding this representation, moving
19 defendants subsequently claimed that US Bank was the owner of the plaintiff's loan in their
20 motion to dismiss the plaintiff's first amended complaint, which was heard on October 28, 2011.
21 On December 15, 2011, the Court denied the defendants' motion to dismiss the plaintiff's
22 complaint for her causes of action for violation of California Civil Code section 2923.5 and for
23 wrongful foreclosure, and sustained with leave to amend her remaining causes of action. The
24 plaintiff filed her second amended complaint on March 27, 2012.
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27 **III. LEGAL STANDARDS**

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1 The only salient issue before a federal district court in a motion to dismiss brought under
 2 Rule 12(b)(6) of the Federal Rules of Civil Procedure is whether a complaint contains “sufficient
 3 factual matter, *accepted as true*, to ‘state a claim for relief that is plausible on its face.’ A Claim
 4 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
 5 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
 6 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).
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8 As the Supreme Court held in *Iqbal* and *Twombly*, motions to dismiss a claim for failure
 9 to state a claim upon which relief may be granted are reserved for situations in which plaintiffs
 10 have failed to state facts (facts are automatically assumed to be true for the purpose of this
 11 motion) that lead to any “cognizable legal theory.” *Id.* (“Factual allegations must be enough to
 12 raise a right to relief above the speculative level . . . on the ASSUMPTION THAT ALL THE
 13 allegations in the complaint are true”) (emphasis in original); *Neitzke v. Williams*, 490 U.S. 319,
 14 327 (1989) (“Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a
 15 complaint’s factual allegations”), *Scheuer v. Rhodes*, 416 U.S. 232, 236 (a properly pleaded
 16 complaint may proceed even if appears that its factual basis is so weak “that a recovery is remote
 17 and very unlikely.”); *al-Kidd v. Ashcroft*, 2009 WL 2836448 (Sept. 4, 2009) (“[W]e proceed as
 18 we must in a review of *all* Rule 12(b)(6) motions, accepting as true *all* facts alleged in the
 19 complaint, and drawing *all reasonable inferences in favor of the plaintiff*”) (emphasis added);
 20 *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1988).
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23 Finally, in the event that a Court does find that a complaint does not properly allege facts
 24 that give rise to liability for some of the causes of action, the policy of granting leave to amend a
 25 complaint, rather than outright dismissing a case, is extremely liberal. *Foman v. Davis*, 371 U.S.
 26 178, 182 (1961).
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28 **IV. ARGUMENT**

A. The FAC Pleads Facts Sufficient to State All Eight Causes of Action

1. Neither the Plaintiff's Claims for Violation of Civil Code section 2923.5 and 2924 are Pre-Empted

The defendants spend three pages arguing that the National Bank Act pre-empts the plaintiff's claim for violation of California Civil Code section 2923.5. Nonetheless, the defendants only cite *one* case that has come to this conclusion, *Acosta v. Wells Fargo Bank, N.A.* No. C 10-991 JF (PVT) 2010 U.S. Dist. LEXIS 50602, at *23-25. However, the plaintiff respectfully submits that the reasoning contained in *Acosta* is erroneous and inapposite to the Ninth Circuit's holding in *Agayo v. U.S. Bank, N.A.*, 653 F.3d 912 (2011). In *Acosta*, the Court ruled that the National Bank Act, 12 U.S.C. § 21, *et seq.*, contained "nearly identical language" of the relevant regulatory language pertaining to the "processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages", as the relevant regulatory language of the Home Owners' Loan Act, 12 U.S.C. § 1641. *See also* 12 C.F.R. § 34.4(a)(10). Thus, the Court found that, since other district courts had found that California Civil Code section 2923.5 is pre-empted by the Home Owners' Loan Act, the statute must pre-empted by the National Bank Act as well.

However, the Court in *Acosta* failed to consider the primary difference between the two statutory schemes, namely that the Home Owners Loan Act pre-empts the entire field of banking as it pertains federal savings association but that federal laws and regulation pertaining to national banking associations, which are governed by the National Bank Act, do not enjoy the same field preemption status. As the Ninth Circuit ruled in *Agayo*, "the language employed by the OCC in its regulations and interpretive letters evidences that application of a more narrow preemption analysis is more appropriate than [the OTS preemption analysis] applied in *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001 (9th Cir. 2008) where the OTS had 'specifically defined a

1 proper preemption test to be employed.’’ 653 F.3d at 922. Indeed, the relevant regulatory
2 language for HOLA explicitly states that the entire field of laws pertaining to “processing,
3 origination, servicing, sale or purchase of, or investment or participation in, mortgages” are
4 entirely preempted by HOLA and its implementing regulations. 12 C.F.R. 560.2(a) (2010).
5 Notably, as the Ninth Circuit observed in *Aguayo*, the relevant regulations for the National Bank
6 Act do not have language giving the Office of the Comptroller of the Currency field preemptive
7 power, as was given to the Office of Thrift Supervision in the Home Owners Loan Act. *Id.* at
8

9 Further, the Fourth Circuit ruled in *Epps v. JPMorgan Chase Bank*, 2012 WL 1134065
10 that a Maryland state law repossession notice requirement is not preempted by the National Bank
11 Act, as the action in question is debt collection and not related to lending. Similarly, California
12 Civil Code section 2923.5 does not mandate any substantive requirements on the lending of
13 secured loans, but rather only regulates the portion of the debt collection process of a Deed of
14 Trust in this state.
15

16 Consequently, California Civil Code section 2923.5 is not preempted by the National
17 Bank Act, and the defendants have only cited one case to come to a contrary conclusion. Finally,
18 it is important to note that the preemption defense would only apply to US Bank and Wells
19 Fargo, as Suntrust and MERS are not national banking associations.
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21 Furthermore, the defendants’ cursory argument that the applicable
22 California foreclosure statutes are preempted are wholly without merit, and the defendants do not
23 cite a single case in which a federal court has made such a ruling. Following the defendant’s
24 logic, the entirety of foreclosure laws throughout the Nation would be pre-empted under this
25 approach, and it is well-settled that foreclosure law had long been considered within the
26 province of state police power. *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 542 (1994)
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1 (“the States have created diverse networks of judicially and legislatively crafted rules governing
 2 the foreclosure process.”). As the Supreme Court held in *Rapanos v. U.S.*, it is well-settled that
 3 it takes a “clear and manifest statement from Congress to authorize an unprecedented intrusion
 4 into traditional state authority” of areas like the regulation of foreclosure. 126 S.Ct. 2208, 2224
 5 (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)).
 6

7 **2. The Plaintiff Has Alleged Facts Sufficient to State a Cause of Action for a**
 8 **Violation of California Civil Code Section 2923.5**

9 While the Court has already denied the defendants’ motion to dismiss on substantive
 10 grounds, the plaintiff addresses the defendants’ contentions briefly, as they are without merit.
 11 The plaintiff does *not* allege in her complaint that she discussed her options to avoid foreclosure
 12 with *any* defendant prior to receiving the Notice of Default in June 2010. The plaintiff alleges
 13 that she attempted to discuss said options with a Suntrust representative and that *she* requested
 14 a forbearance plan, but that she was told to fax in paperwork. The plaintiff did fax in the
 15 requisite paperwork, but was informed by SunTrust that they did not receive. However, the
 16 plaintiff has never had any sort of discussion regarding her options to avoid foreclosure, and
 17 she alleges precisely the opposite in her SAC (stating that SunTrust repeatedly told her that they
 18 had no authority to offer any alternative to avoid foreclosure, and that the other defendants
 19 wholly disavowed having any interest in her loan).
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22 The defendants reliance on *Hutchful v. Wells Fargo Bank, N.A.* is therefore misplaced.
 23 No. 11-55664, at 3 (9th Cir. Mar. 12, 2012). In that case, the Ninth Circuit affirmed a district
 24 court’s denial of a plaintiff’s motion for preliminary injunction when faced with a record that
 25 demonstrated that the plaintiff had “extensive discussions” with the defendants regarding
 26 alternatives to foreclosure. No such “extensive discussions” are alleged here, nor was any
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evidence of said discussions presented at the evidentiary hearing on the plaintiff's motion for a preliminary injunction. Consequently, the Court should reject the defendants' contentions out of hand.

3. The Plaintiff Has Properly Alleged Facts To Support a violation of RESPA Against Suntrust and Wells Fargo

In the plaintiff's complaint, she duly alleges that she submitted a "qualified written requests" to Suntrust (on two occasions), MERS, Wells Fargo, and US Bank. FAC 25, 28, 36 and 37. Moreover, the plaintiff also alleges that Suntrust responded to her first letter to them by referencing another individual's loan, and not her. In the second letter sent by the plaintiff to Suntrust, the plaintiff explicitly states "that until a written response is given, Client disputes the amount owing because there are or may be charges, fees, costs, or other line items for which Client is unaware of contractual or legal authority." Indeed, such a suspicion was well-founded, as Suntrust responded with a letter that states that Wells Fargo, N.A. owns her loan (despite the fact that US BANK is the last recorded assignee of the Deed of Trust, a fact admitted by Suntrust in this letter and by its counsel on the record at the hearing on the motion). Furthermore, this letter is reproduced almost verbatim in one of the leading treatises on California foreclosure law. *See* 1 Roger Bernhardt, *California Mortgages, Deeds of Trust, and Foreclosure Litigation*, § 7.30 (4th ed. 2011).

The defendants' take issue with one of the letters sent by the plaintiff, which was sent by her counsel, See Defendant's Opposition, pg. 8, and cursorily argue that it does not suffice to be a "qualified written request" under RESPA. Under 12 USC 2605(e)(1)(b), all that is required for a correspondence to be considered a "qualified written request" is that the correspondence be in writing; it cannot be written on a payment coupon; it includes, or provides a manner by which the servicer can identify, the name and account of the borrower and a statement of the reasons for

1 the borrower's belief that the account is in error or *sufficient detail regarding other information*
2 *sought by the borrower.* (emphasis added). The second letter that the plaintiff sent to Suntrust
3 (which was sent by her counsel) explicitly requested that Suntrust "provide us with documents
4 and documentation supporting your collection and enforcement efforts, including, without
5 limitation, all documents and documentation in support of the enforcement of the Promissory
6 Note . . . and all of those documents and disclosures made or presented to or signed by Client or
7 any other party to the transaction at the time of making of the Note and Deed of Trust *and the*
8 *names of the original lender and all assignees,* as well as any reporting of the account internally
9 and to credit bureaus."

10
11 This letter explicitly states that it is asking for "documentation" supporting the
12 "enforcement of the Promissory Note", and asks for the names of "all assignees" (and such a
13 request is eminently important and reasonable considering the vast confusion and discrepancies
14 displayed by the different defendants in this case regarding the ownership of her loan). Indeed,
15 the plaintiff alleges in the FAC that she has been harmed by not knowing the true owner of her
16 loan as well as whether her payments were properly applied, both of which suffice to allege harm
17 for this cause of action. Thus, the cases cited by the defendants in which the plaintiffs failed to
18 identify any harm to them by not receiving a proper response to a qualified written request are
19 utterly distinct from the situation at bar.

20
21 Finally, the defendants argue that the plaintiff has not properly alleged damages in the
22 SAC for her RESPA claim. However, the plaintiff clearly states that she has been harmed by
23 "incurring additional late payment penalties, an increased loan balance, damaged credit, and
24 being forced to file bankruptcy by not being provided accurate information regarding the owner
25 of her loan whom she could negotiate an alternative to avoid foreclosure." *See Second Amended*
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1 *Complaint paragraph 5 of RESPA Cause of Action.* Moreover, the plaintiff has endured severe
 2 emotional distress by not being provided with accurate information from these defendants. *Id.*
 3 In *Milyakov v. JPMorgan Chase, N.A., et al.*, Case No. 11-cv-02066, Dkt. 20 (N.D. Cal. Sep. 2,
 4 2011), Judge Alsup denied a defendant's motion to dismiss a plaintiff's RESPA claim with
 5 similar allegations of damages. Thus, the Court should not deny the defendant's motion to
 6 dismiss son this ground.
 7

8 **4. The Plaintiff Has Properly Alleged a Wrongful Foreclosure Claim and**
 9 **Violations of California Civil Code § 2932.5**

10 This Court, in a lengthy decision, has already rejected the defendants' motion to dismiss
 11 this cause of action, yet the defendants persist on making the same arguments that California
 12 foreclosure laws may be violated with impunity unless the plaintiff can prove all of the elements
 13 of fraud. However, the defendants are dead wrong: the tort of "wrongful foreclosure" is *not*
 14 analogous to "fraud". Rather, all that the plaintiff has to allege is that there has been, or that
 15 a plaintiff has been threatened with, an "illegal" or "willfully oppressive" sale under a Deed of
 16 Trust. *Munger v. Moore*, 11 Cal.App.3d 1, 7 (1970). Indeed, in *Kachlon v. Markowitz*, 168
 17 Cal.App.4th 316, 329, a jury awarded the plaintiff punitive damages in a wrongful foreclosure
 18 case where the plaintiff alleged that the defendant's initiation of foreclosure was wrongful. In
 19 that case, the jury did *not* find that all of the elements of fraud were met, and it is apparent from
 20 the Court's opinion that there was no reliance on anything that the defendants did (as the plaintiff
 21 challenged the defendants right to foreclose from the beginning). *Id.* While the jury ruled that
 22 the foreclosure was "fraudulent", the use of this term was used in the context of California Civil
 23 Code 3294 which, as explained in detail in the plaintiff's opposition to the motion to strike, does
 24 not have a "reliance" prong. *Id.* The Second District affirmed in full the jury verdict, including
 25 the award for punitive damages. *Id.*
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1 This Court already rejected the defendants' reliance on *Gomes v. Countrywide Home*
 2 *Loans, Inc.*, 192 Cal.App.4th 1149, 1152 (Feb. 18, 2011), and the *Gomes* Court itself
 3 distinguished situations like the one at bench from the one before it (Court found that allegations
 4 of backdating is an "infirmity" in the foreclosure process). Moreover, Judge Jeffrey White
 5 affirmed this Court's ruling only three weeks ago in *Makreas v. First Naitonal Bank of Northern*
 6 *California, et al.*, 2012 WL 1144275 (N.D. Cal. Apr. 4, 2012). Indeed, as this is a matter of state
 7 law, there is binding California appellate precedent that clearly holds that a "borrower who
 8 believes that a foreclosing entity lacks standing to do so . . . can seek to enjoin the sale or to set
 9 the aside the sale." *Robinson v. Countrywide Home Loans, Inc.*, 199 Cal.App.4th 42, 46 n. 5.
 10

11 Furthermore, the defendants reliance on another California appellate case also fails to
 12 support their arguments. In *Fontentot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 272, the
 13 First District of the California Court of Appeal explicitly distinguished the numerous cases cited
 14 by the Court in its previous order denying the defendants' motion to dismiss from the one before
 15 the Court of Appeal. *Id.* at 268 (distinguishing *Sacchi v. Mortgage Electronic Registration*
 16 *Systems, Inc.*, 2011 WL 2533029, at *9-10 (C.D. Cal. June 24, 2011); *Ohlendorf v. Am. Home*
 17 *Mortg.*, No. Civ. S-09-2081k LKK/EFB, 2010 U.S. Dist. LEXIS 21098, at *21-24; *Castillo v.*
 18 *Skoba*, No. 10cv1838 BTM, 2010 WL 3986953, at *2 (S.D. Cal. Oct. 8, 2010).
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21 In sum, the defendants present no new persuasive arguments, but continue to make their
 22 claim that a bank may run roughshod over California foreclosure laws and a plaintiff may not
 23 come into Court to seek redress for these wrongs. While such a proposition runs afoul of
 24 perhaps one of the most well-established principles of American jurisprudence (for every wrong,
 25 there is a remedy, *see Marbury v. Madison*, 5 U.S. 137 (1803)), it is also not true that the
 26 plaintiff has not been prejudice. As this Court previously noted, "the threat of foreclosure by the
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wrong party would certainly be prejudice to the homeowner.” *Tamburri v. Suntrust Mortgage, Inc.*, 2011 WL 6294472 at *14 (N.D. Cal. Dec. 15, 2011). Moreover, the plaintiff’s second amended complaint is filled with the amount of emotional anguish she has endured as a result of the unlawful foreclosure proceedings commenced against her. As stated earlier, the plaintiff is entitled to receive monetary damages for that harm through this action. *Munger v. Moore*, 170 Cal.App.3d 1,7, 11 (citing Cal. Civ. Code § 3333).

Finally, the Court’s analysis of California Civil Code section 2932.5 is discussed in detail in its previous order. While the defendants cite cases coming to contrary rulings, it is important to note that the California Supreme Court has not weighed in on this matter at this time.

5. The Plaintiff Has Properly Plead “Fraud” and “Unfair Business Practices” Claims

While the plaintiff provides very precise details over the dates, names and documents that provided materially false information to the plaintiff, the defendant claims that the plaintiff has not made such allegations with the requisite specificity for either common law fraud or violations of the California Business and Professions Code section 17200, et seq. However, the plaintiff explicitly recounts specific conversations, identities and dates in which she was told by Suntrust that Wells Fargo owned her loan, and also specific letters and conversations with Wells Fargo in which they disavowed having any interest in her loan. Moreover, the plaintiff alleges that both parties made said statements maliciously in order to obtain additional compensation pursuant to the pooling and servicing agreement, in which the plaintiff’s loan was placed in. Furthermore, the plaintiff alleges that she relied upon these statements by not seeking out to the true owner of her loan options to avoid the foreclosure of her home. Finally, the plaintiff chronicles in detail the emotional distress and other harm she suffered as a result of the fraudulent statements.

1 Likewise, the plaintiff provides the same specificity with her violations of California
2 Business and Professions Code section 17200 claim. Moreover, Judge White in *Makreas* ruled
3 that wrongfully backdating of a substitution of trustee was sufficient to state a viable cause of
4 action for violation of Business and Professions Code section 17200 claim, which is identical to
5 the plaintiff's allegations in this case. *Makreas*, 2012 WL 144275.
6

7 **6. The Plaintiff Has Properly Plead "Quiet Title" and "Declaratory Relief" Claim**
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9 Both of these causes of action purport to address the status of title for plaintiff's home
10 following judgment of this action. As the plaintiff pleads in her complaint, the plaintiff is
11 not seeking a windfall of a free house, but wishes to quiet title subject to the "valid
12 encumbrances" on her home. In *Dimock v. Emerald Properties*, 81 Cal.App.4th 868, 876 (2000),
13 the California Court of Appeal set aside a foreclosure sale and quieted title subject to the
14 valid encumbrances that existed on the property prior to the sale. The plaintiff seeks to only
15 quiet title against lien that is found to be invalid in the situation at bench, which is what the
16 plaintiff seeks in her declaratory relief cause of action as well (as well as a judgment pertaining
17 to the various unlawful foreclosure documents filed in this case) .
18

19 **7. The Plaintiff Has Properly Plead "Quiet Title" and "Declaratory Relief" Claim**
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21 In the Court's previous order, it noted that a duty may arise through statute, such as
22 California Civil Code section 2923.5, but that it is necessary to demonstrate damages. In the
23 plaintiff's second amended complaint, she chronicles in detail the emotional harm she has
24 suffered by not being provided with the options required by law that could help her save her
25 home.
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28 **Date: April 24, 2012**

/s/ Nelson W. Goodell

NELSON W. GOODELL

The Goodell Law Firm

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